Novel Concepts: A Comment on *Egan and Nesbit* v. *The Queen*

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For lesbian and gay activists, debates about the potential of constitutional rights struggles are well established. While many have been attracted to the legal arena as a focus for social movement activism, others have been sceptical about the likelihood of progressive social change emanating from *Charter* politics. The Supreme Court of Canada's recent decision in *Egan and Nesbit* v. *The Queen*[1] will provide considerable new ammunition with which to highlight the limitations of constitutional rights struggles for lesbians and gay men. At the same time, however, the case underscores how the articulation of lesbian and gay narratives within legal discourse can prove troubling for the judiciary. The appellants' history as gay men forces some members of the Court onto the defensive which leads to a justification of the role of marriage in society. Putting marriage and, indeed, heterosexuality on the defensive might well be an important step in destabilizing its centrality. Consequently, the political implications of *Egan*, and lesbian and gay *Charter* politics more generally, remain rather indeterminate.

Background

The issue in the case was whether the definition of "spouse" in section 2 of the *Old Age Security Act*[2] violates section 15(1) of the Charter. The *Act* provides for a "spousal allowance" to be paid to the spouse of a pensioner when that spouse is between the ages of sixty and sixty-five and the combined income of the couple falls below a specified level. Spouse is defined to include "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife." Egan and Nesbit lived together since 1948 in a sexual relationship which exhibited many of the "traditional" characteristics associated with marriage. In October, 1986, Egan became eligible to receive old age security and the guaranteed income supplement. Because their combined income fell below the fixed level, Nesbit, upon reaching the age of sixty, applied for the spousal allowance. The application was rejected because he failed to meet the opposite sex requirement in the definition of spouse in section 2. Egan and Nesbit brought an action in the Federal Court, arguing that the definition of spouse contravenes section 15(1) of the *Charter* on the grounds that it discriminates on the basis of "sexual orientation." They sought a remedy in the form of a declaration that the definition be extended to include "partners in same sex relationships otherwise akin to conjugal relationships."

At the Federal Court Trial Division, the action was dismissed.[3] While Martin J. concluded that had Nesbit been a woman he would have been eligible for the spousal allowance, the distinction in law was made not on the basis of "sexual orientation," but between spousal and non-spousal couples. The objective of the law was "to alleviate the financial plight of elderly married couples, primarily women who were younger than their spouses and who generally did not enter the work force."[4] The Federal Court of Appeal, upheld that decision.[5] Robertson J.A. (Mahoney J.A. concurring) agreed that "the criterion of entitlement is expressed in terms of spousal status" and "homosexual" couples were not adversely affected in relation to other non-spousal couples.[6] In dissent, Linden J.A. held that the legislative distinction was based upon a characteristic related closely to sexual orientation, which was an

analogous ground under section 15(1) of the Charter. The *Charter* violation, moreover, could not be saved under section 1 because the law did not minimally impair the right.

At the Supreme Court of Canada, a majority accepted that the definition of spouse offended section 15(1).[7] The minority, on the other hand, followed the judgments below, characterizing the distinction as one between spouses and non-spouses, and not one based upon "sexual orientation."[8] Of the majority, however, only four ruled that the violation could not be saved under section 1. Sopinka J. found, instead, that the *Charter* infringement could be justified. Consequently, the definition of spouse remains unaffected in the law.

THE PURPOSE OF THE LEGISLATION

The divergence of opinion within the Court in large measure stems from the different ways in which the purpose of the spousal allowance is characterized. La Forest J. described at length the "functional values" that underlie the legislation. For him, the spousal allowance is a product of Parliament's desire to take "special account" of married couples in need; a singling out that excludes numerous other sorts of people who live together. The subsequent extension of the definition of "spouse" to include unmarried heterosexual conjugal couples is simply a reflection of "changing social realities." In fact, La Forest J. characterized the purpose far more broadly than simply as a desire to benefit elderly poor married people. Rather, the law is designed to support the institution of marriage itself and the concomitant "unique ability" of heterosexual couples to procreate and raise children. Thus, it appears that the law provides a benefit to recognize the expenses involved in child rearing.[9] Given this purpose, according to La Forest J., the distinction between spouses and non-spouses is perfectly logical: "[i]t would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage."[10] Moreover, support for the institution of marriage is not constitutionally suspect, nor is the promotion of stable heterosexual relationships which, for La Forest J., is a further purpose (or at least a benefit) of the spousal allowance. Thus, in neither purpose nor effect does the distinction violate section 15(1). Excluded couples are "incapable" of meeting the objectives that Parliament sought to promote.[11] The distinction is neither irrelevant nor arbitrary.

The weakness with that characterization is that the spousal allowance is a clumsy piece of legislation with which to achieve those ends. The Act makes no reference to children. In fact, it includes any common law couple that has lived together for a year. No benefits accrue to a couple that has raised children if that couple happen to be the same age. Nor is there any benefit for poor women who have raised children on their own.[12]

A more obvious purpose of the law, one for which there is some evidence in the Parliamentary record, is that the spousal allowance was designed to recognize that the "traditional" pattern of married life involved female spouses, younger than their husbands, leaving the workforce to raise children, often without returning to full time or at all. Upon retirement of the male partner, the family income would drop sharply in many cases, imposing hardship. While this may have motivated the introduction of the benefit, Cory J. points out that the *Act* makes no reference to dependent female spouses. The most that can be claimed regarding purpose is that, minimally, "the Act is designed to benefit either the male or female member of a heterosexual common law [or married] couple who have lived together for a period of one year and have a net income which is below the fixed level."[13] As a consequence, the benefit provides "state recognition of the legitimacy of a particular status" and "a recognition by the state of the societal benefits which flow from supporting a couple who, for at least a year, have established a stable relationship which involves cohabitation, commitment, intimacy, and economic interdependence."[14]

It is through the competing characterizations of the law's purpose that the different outcomes are reached. For Cory J., the law provides an economic benefit which recognizes the social contribution of cohabiting couples who find themselves poor (with an age spread between them). The character of that contribution remains unspecified as do the social benefits of a relationship of economic dependence. L'Heureux-Dubé J., in separate reasons, more clearly articulates the purpose as providing "an entitlement to a basic *shared* standard of living" from which same-sex couples have been completely excluded.[15] By divorcing the purpose from the promotion of an exclusively heterosexual institution (marriage) and the raising of children, the discriminatory effect of the law becomes apparent. It is only by linking the

benefit to the status of being married, and then immunizing marriage from constitutional review (a contentious move in itself), that a finding of discrimination is avoided by La Forest J.

DISCRIMINATION: OF GROUNDS AND GROUPS

La Forest J. avoids a finding of discrimination on the face of section 2 by characterizing the legal distinction as between spousal and non-spousal couples, with a benefit to the former which attempts to "ameliorate an historical disadvantage" suffered by child-raising married people. In contrast, both Cory J. and L'Heureux-Dubé J. are forced to grapple with the analytical framework through which a finding of discrimination for the purposes of section 15(1) of the *Charter* will be reached. While Cory J. offers a straightforward *Charter* equality analysis, L'Heureux-Dubé J. attempts an interesting reformulation of section 15(1) in which she shifts the emphasis onto the discrimination itself.

Cory J. begins by asking whether the difference in treatment is closely related to a personal characteristic of a group to which the claimant belongs. Having found in the affirmative, he then proceeds to consider whether the personal characteristic — "sexual orientation" — is analogous to the enumerated grounds in section 15(1). Cory J. quickly concludes that this basis for distinction does "serve to deny the essential human dignity of the *Charter* claimant," as demonstrated by the social, political, and economic disadvantage suffered by "homosexuals."[16] Moreover, discrimination against a "homosexual couple" cannot be separated analytically from "sexual orientation" discrimination. For Cory J., the constitutional protection extends both to aspects of "status" and "conduct."[17] A finding of discrimination thus results from the denial of an economic benefit and the right to make a choice to receive that benefit (as opposed to other benefits available to single people), and from the resulting stigmatization and loss of self worth. The explicit recognition that equality rights extend both to status and conduct is a potentially important judicial pronouncement which might result in a broader interpretation of the scope of constitutional protection than otherwise would be the case.[18]

Although she reaches the same result as Cory J., L'Heureux-Dubé J. embarks on an impressive attempt to centre section 15 analysis, not on the grounds of discrimination, but on the core meaning of the guarantee: "that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens."[19] It is because some individuals and groups have been subject to historic disadvantage and marginalization that they are more likely to be demeaned by a legislative distinction. However, L'Heureux-Dubé J. makes explicit that membership in a socially marginalized group is not a precondition to a successful equality claim. Rather, discrimination is determined by measuring the impact on the individual from the perspective of "the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances."[20] A focus on analogous grounds thus would be replaced by L'Heureux-Dubé J. with an examination of whether a distinction is discriminatory in terms of the nature of the group adversely affected and the nature of the interest at stake: "the more socially vulnerable the affected group and the more fundamental to our popular conception of 'personhood' the characteristic which forms the basis for the distinction, the more likely that this distinction will be discriminatory."[21] The appeal of this approach lies in the possibility of examining a broad social context and the particular location of the claimant within a matrix of social relations, which L'Heureux-Dubé J. recognizes may be lost in what she sees as the increasing formalism of the categorical approach to discrimination. In this respect, her views are consistent with those who have expressed concern about the limitations of a categorical approach to equality.[22] On the facts of this case, L'Heureux-Dubé J. easily finds a section 15(1) violation, especially since she explicitly analyzes the distinction from the point of view of those affected, rather than assuming a vantage point of "illusory neutrality." In terms of the nature of the group, the claimants are "homosexual men," as well as "elderly and poor." The group of "homosexuals" is based upon a characteristic "that is quite possibly biologically based and that is at the very least a fundamental choice."[23] As for the interest affected, the exclusion of the appellants from an entitlement sends the "metamessage" that "society considers such relationships to be less worthy of respect, concern and consideration."[24] That result is clearly discriminatory within L'Heureux-Dubé J.'s framework.

The impact of L'Heureux-Dubé J.'s reformulation of equality analysis remains to be seen. Given that she wrote only for herself, it may prove to be of academic interest only. However, it potentially presents a more flexible and generous approach to

section 15(1) which avoids the pitfalls of a rigid categorical approach. It will be interesting to observe in future judgments whether L'Heureux-Dubé J. can persuade some of her colleagues of the merits of "putting discrimination first" in equality jurisprudence.

Section One Analysis

Neither Iacobucci J. nor L'Heureux-Dubé J. exhibited any hesitation in determining that the infringement of section 15(1) cannot be upheld pursuant to section 1 of the Charter. For Iacobucci J., once the purpose of the legislation is characterized as the alleviation of poverty amongst elderly households, then the definition of spouse in section 2 is not rationally connected to that purpose, because "same sex relationships involve similar levels of economic dependence, mutual responsibilities and emotional commitment" as heterosexual relationships.[25] Iacobucci J. also highlighted a problem of federal-provincial coordination: increasingly, provincial social welfare legislation recognizes same-sex couples. This divergence may lead to inconsistent treatment and a substantial impairment of the right to equality. Finally, Iacobucci J. was sceptical of the financial burden that an expanded definition of spouse would impose upon government. Likewise, L'Heureux-Dubé J. held that while the objective of the spousal allowance program is not, in itself, discriminatory in purpose, it is based upon a discriminatory presumption which is not rationally connected to that purpose. Such a presumption has a "significant discriminatory impact" which could not withstand a proportionality analysis.

By contrast, Sopinka J. accorded a high level of deference to the government because of the socio-economic nature of the issue: "in these circumstances, the court will be more reluctant to second-guess the choice which Parliament has made."[26] Financial constraints necessarily demand choices between disadvantaged groups and the failure of the government to further expand the definition of spouse to same sex couples — which remains a "novel concept" — therefore survived section 1 scrutiny. This degree of deference is quite unprecedented and starkly contrasts with early ringing pronouncements from the Court on the strictness of judicial scrutiny under section 1.[27] Moreover, the novelty of the case is hardly in itself a basis upon which to uphold a *Charter* violation; and financial burden has been held by the Court to carry only limited weight as a justification.[28]

To some extent, however, Sopinka J.'s concern with the financial impact on the government of an extended definition of spouse is bolstered by the attempts of Cory, Iacobucci, and L'Heureux-Dubé JJ. to characterize same-sex couples as no different from heterosexuals in terms of the ways in which relationships of financial dependence develop. This emphasis on sexual sameness obviates the fact that, historically, the raising of children, the related difficulty for women of entering and exiting the paid labour force, the income gap between men and women generally, and stereotyping of women's roles probably were the main factors which created the relationships of dependence. While some of those factors may be present in some same-sex relationships — such as the need to interrupt careers to care for children and, in the case of lesbians, the discrimination suffered by women in the labour force more generally — it could be a mistake to assume that same-sex couples will impose a proportionate level of burden on the treasury. Moreover, Sopinka J. might well have considered the likelihood of same-sex couples claiming a spousal benefit, given that such a move demands a degree of "outness" rendered less likely by the historical and continuing prejudice and discrimination outlined by Cory J. Finally, as Iacobucci J. noted, federal-provincial harmonization would be a useful means to avoid a patchwork whereby relationships are recognized in some jurisdictions but not others. Given that "two can live more cheaply than one," it would be a strange situation if elderly poor individuals are left further worse off by the social welfare system as a whole than are couples of any orientation. This problem further underscores the difficulty of analyzing a piece of social assistance legislation in isolation.

Conclusion

The decision of the Supreme Court in *Egan and Nesbit* is of interest for various reasons. First, the case contains the first explicit Supreme Court endorsement that "sexual orientation" is an analogous ground of discrimination pursuant to section 15(1) of the Charter. Perhaps of more general interest is L'Heureux-Dubé J.'s attempt to reformulate the analytical approach to equality so as to lessen the dependence upon the identification of grounds. Whether her approach attracts support in subsequent cases will be worth watching. Second, the fact that

four members of the Court embarked upon an extended defense of the institution of marriage (and, by extension, heterosexuality) is significant. Given that the definition of spouse includes any cohabiting heterosexual couple together for *one year*, the rhetoric of La Forest J. seems at odds with the statutory language itself. However, the unremitting defense of marriage does partially defuse the argument raised by some commentators that the *Charter* has become a tool for liberal social engineering.[29] At the same time, the fact that four members of the Court are prepared to articulate this position may give rise to scepticism about the likelihood of successfully employing *Charter* litigation as a means of achieving progressive social change in terms of the lesbian and gay rights agendas.

On the other hand, the fact that La Forest J. found it necessary to articulate his wide-ranging defense of heterosexual marriage (and "traditional" families) suggests that the norm may be somewhat "troubled" by the public articulation of gay/lesbian narratives such as those of Egan and Nesbit.[30] Despite the outcome of the case, the publicity and, indeed, the positively glowing descriptions of the relationship of the appellants might have some positive educational value and some destabilizing effect on heterosexual hegemony.[31]

Third, the case may provoke governments to rethink how they seek to alleviate poverty. The spousal allowance is clearly a cumbersome and somewhat arbitrary mechanism based upon a model of relationships that is increasingly inapplicable to most couples. Amongst the working poor, relationships in which both parties are in low paid jobs, rather than in a relationship of economic dependence, are more realistic.[32] So too, the spousal allowance hardly compensates adequately those couples who bear the financial burden of raising children, which is not designed for that purpose (contrary to the dicta of La Forest J.), and which will not even benefit all of those who have raised children and then find themselves poor.

Finally, *Egan* has forced the Court to attempt an articulation of the social value of conjugal relationships to society. At one point, Cory J. does note that "the relationship of many heterosexual couples is sometimes far from ideal." But this is the only suggestion that 'marriage' and 'family' may not always be socially and individually beneficial. The case thus exemplifies a conundrum for lesbian and gay rights strategists. In attempting to appropriate a state benefit for same sex couples, the resulting judicial discourse leaves virtually no space for the articulation of a critique of the institutions upon which a system of compulsory heterosexuality is founded. Such a result is certainly not surprising, but it should remind us once again of the limits of legal discourse generally and *Charter* litigation in particular.❑

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ENDNOTES

1. [1995] S.C.J. No. 43 (QL) [hereinafter *Egan*].
2. R.S.C. 1985, c.O-9.
3. [1992] 1 F.C. 687.
4. *Ibid.* at 693.
5. [1993] 3 F.C. 401.
6. *Ibid.* at 478.
7. The majority consisted of L'Heureux-Dubé, Sopinka, Cory, McLachlin, and Iacobucci JJ. Cory and Iacobucci JJ. delivered joint reasons (Cory J. writing on the section 15(1) issue and Iacobucci J. on section 1). McLachlin J. concurred with those reasons and Sopinka J. concurred with the section 15(1) analysis only. L'Heureux-Dubé J. delivered separate reasons, but reached the same conclusions as Cory and Iacobucci JJ.
8. The minority judgment was delivered by La Forest J. and concurred in by Lamer C.J., Gonthier and Major JJ.
9. *Egan*, paras. 20-25.
10. *Egan*, para. 21.
11. *Egan*, para. 26.
12. On this point, however, La Forest J. suggested in passing that one benefit of the spousal allowance may be to encourage the raising of children by married couples rather than single parents.
13. *Egan*, para. 148.
14. *Egan*, para. 161.
15. *Egan*, para. 90.
16. *Egan*, para. 171. La Forest J. agreed with Cory J. that "sexual orientation" is an analogous ground of discrimination. In fact, the issue was conceded by the respondent.

17. *Egan*, para. 175.

18. See Mary Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17 Dal. L.J. 130.

19. *Egan*, para. 36.

20. *Egan*, para 41.

21. *Egan*, para 61.

22. See e.g., Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179; Mary Eaton, "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1994) 1 Rev. Constitutional Stud. 203; Carl Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Cdn. J. Law & Juris. 49.

23. *Egan*, para. 89. At this point, L'Heureux-Dubé J. seems to suggest that a genetic basis for "homosexuality" would strengthen the claim of "homosexuals" under the Charter. She also held that to the degree that membership in a group involves "unfettered choice" a finding of discrimination will be less likely. In the context of "sexual orientation," however, the use of immutability arguments is problematic. See Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" (1994) 46 Stan. L. Rev. 503; Stychin, *supra* note 12.

24. *Egan*, para. 90.

25. *Egan*, para. 195.

26. *Egan*, para. 109.

27. See e.g., *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, per Dickson C.J.

28. See *Schachter* v. *The Queen*, [1992] 2 S.C.R. 679 at 710-12, per Lamer C.J.

29. See e.g., Rainer Knopff and F.L. Morton, *Charter* Politics (Scarborough: Nelson Canada, 1992). For a discussion of conservative academic reaction to the Charter, see Herman, "The Good, the Bad, and the Smugly: Perspectives on the *Canadian Charter of Rights and Freedoms*" (1994) 14 Oxford J. Leg. Stud. 589.

30. On the possibility of "troubling" the heterosexual norm through rights struggles, see D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) 147.

31. On the value of lesbian and gay narratives, see generally Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men" (1992) 46 U. Miami L. Rev. 511.

32. Cory J. discusses at some length how the 'at home' dependent spouse model is no longer applicable to the great majority of Canadians.